UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDRE ROYAL, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al.*, Defendants.	)	No. 1:19-cv-5164-AJN

REPLY MEMORANDUM IN SUPPORT OF THE BOARD DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO RULE 12(b)(1) AND RULE 12(b)(6), AND MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

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PRELIMINARY STATEMENT

Royal copied another lawsuit, added some dubious allegations of his own, and launched this litigation to undo a decades-old, fully-favorable benefits decision under the mistaken belief he was entitled to a different level of total and permanent disability ("T&P") benefits when he first applied nearly 20 years ago. For the reasons explained in the Board Defendants' motions (ECF 16-2, 7-2), ***Royal could never qualify for the higher level of benefits***. Therefore, Royal was never harmed by any of the alleged acts or omissions; he has no standing to bring these claims; and the Court should dismiss the Amended Complaint (ECF 15), with prejudice, for this reason alone.

Royal's opposition (ECF 28)[1] presents a veritable hodgepodge of confused arguments and ever-evolving allegations. The opposition blithely misstates or misconstrues the terms of the Plan. It presents allegations found nowhere in the Amended Complaint, including suspect allegations that are immaterial to the issues before the Court, and ignores the dispositive impact of contradictory allegations from the original Complaint. It confuses the provisions and requirements of ERISA, the federal statute that purportedly gives rise to each of Royal's claims. And it pays lip service, at most, to the arguments set forth in the Board Defendants' motion.[2]

The Board Defendants have not mocked Royal, as his attorneys say, nor have they ever tried to deny him benefits to which he is entitled. The Board Defendants filed their motion(s) and argued that Royal's claims fail because the claims do fail; they have no basis whatsoever in law or fact.

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[1] Royal filed two opposition briefs; one was barely timely (ECF 28), the other clearly was not (ECF 29). The Board Defendants reply to Royal's timely submission.

[2] Royal, like the plaintiff in *Hudson*, abandoned Count IV. Opp. at 3, n.2. It should be dismissed, with prejudice, for this reason and all of the other reasons already explained by the Board Defendants in their opening brief.

ARGUMENT & AUTHORITIES

I. Royal Lacks Standing To Bring Counts I And II Because He Could Never Qualify For Active Football Benefits And He Concedes He Does Not Meet The Requirements For Reclassification.

A. Royal could never qualify for Active Football benefits.

In Counts I and II, Royal avers he would have "correctly" applied for Active Football benefits in 2000 if he had a copy of the 1995 Plan Document or an adequate SPD. Am. Compl. ("AC") ¶¶ 43, 46-48, 55, 72. As the Board Defendants' opening brief explained, Royal lacks standing because he could ***never*** satisfy the requirements for Active Football benefits. Mem. in Support of Mot. to Dismiss ("Mem.," ECF 16-2) at 7-11. Royal's opposition fully validates the point.

Active Football benefits have three requirements: **(1)** the Player's disability must "result[] from League football activities;" **(2)** the disability must "arise[] while the Player is an Active Player;" and **(3)** the disability must "cause[] the Player to be totally and permanently disabled 'shortly after' the disability first arises." Plan Doc. 5.1(a); Opp. at 10. "Shortly after" is defined by the Plan.[3] A "Player who becomes totally and permanently disabled more than twelve months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled 'shortly after' the disability(ies) first arises." Plan Doc. § 5.1.

The Court does not need to wade through Royal's medical history (gratuitously attached to his opposition) or counsel's (mis)characterizations of it to understand that Royal could never meet the third, "shortly after" requirement. Royal's Complaint alleges—and his opposition does

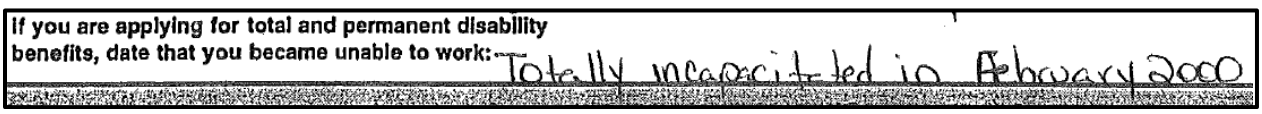
[3] Royal's opposition completely ignores the Plan's "shortly after" definition. Royal argues "his total and permanent disability arose shortly after, and within one year, of his application for benefits" and the Board "knew" he would apply "shortly after, he left the Indianapolis Colts." Opp. at 6-7, 21. The date Royal filed his application is irrelevant to whether he meets the "shortly after" requirement. Plan Doc. § 5.1. If Royal became totally and permanently disabled ***after*** he filed his application, as he argues, he most certainly could not qualify for Active Football benefits.

not dispute—his seizures began "more than twelve months" before he became "totally and permanently disabled." *See* AC ¶¶ 18, 40. Royal is therefore "conclusively deemed not to have become totally and permanently disabled 'shortly after' the disability(ies) first arises," and he could not receive Active Football benefits. Plan Doc. § 5.1. Nothing the Board did or did not do affected Royal in a personal and individualized way. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

B. Royal's multiple attempts to change positions to meet the exigencies of the case do not save him.

The Amended Complaint tried to invent a distinction between "petit mal" and "grand mal" seizures, in direct contradiction of Royal's prior allegations. *Compare* Compl. (ECF 1) ¶ 43 (alleging he suffered from "grand mal seizures" in 1998 while playing with the New Orleans Saints), *with* AC ¶ 40 (alleging his "petit mal seizures" did not "evolve[] into grand mal seizures" until 2000). The Board Defendants already explained why this *post hoc* distinction fails. Mem. at 8-10. Royal offers no response; he instead confirms the nature of his disability and that it first arose more than 12 months before he applied for benefits. *See, e.g.*, Opp. at 4 (arguing that "further documentation" shows Royal experienced a grand mal seizure on "8/14/98").

Royal bizarrely claims he "received his total and permanent disability in November of 1999." Opp. at 6-7. But this claim appears nowhere in the Amended Complaint, and it too directly contradicts Royal's prior allegation that his "total and permanent disability **did not arise until 2000**." AC ¶ 40 (emphasis added). It also contradicts what Royal himself stated in his application for benefits:


If you are applying for total and permanent disability benefits, date that you became unable to work: Totally incapacitated in February 2000

7/20/2000 Appl. for Disab. Benefits ("Application," ECF 28-19) at 1. Royal cannot create alternative facts to plead around the Board Defendants' dispositive arguments. *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012). Furthermore, it makes no difference if Royal became "totally and permanently disabled in November 1999," as Royal tries to claim, because even this date is more than 12 months after his "disability first arose" in June or July or August 1998. *See* Application at 2 (stating that disability occurred "6/1998"); Opp. at 4 (arguing that Royal's petit and grand mal seizures began in July and August 1998 respectively).

C. Royal does not dispute he lacks standing to complain about the reclassification provision.

The Board Defendants argued that Royal does not have standing to complain about the SPD's supposed failure to disclose the Board's interpretation of the reclassification provision because that provision and the Board's interpretation of it had nothing to do with him. Mem. at 10-11. Royal does not address, and must therefore concede, this argument.

II. Count I Also Fails Because The SPD Complied With ERISA Section 102, And Royal's Claim Is Untimely.

A. Royal does not challenge the Board's argument—adopted by the Court in *Hudson*—that the SPD is sufficient as a matter of law.

ERISA section 102 provides an SPD shall "reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). In Count I, Royal alleges the "Plan" violated section 102 by failing to explain the Plan's reclassification provision. AC ¶ 53. As the Board Defendants' opening brief explained, this allegation fails because (1) Section 102 applies to SPDs, not plan documents and, in any event, (2) the SPD complied with ERISA section 102 as a matter of law. Mem. at 12-14.

Royal does not respond to the Board Defendants' arguments. Nor could he. In *Hudson*—the case from which Royal lifted the bulk of his allegations—Judge Woods just

dismissed, with prejudice, an identical challenge to the same provision in the same SPD. *Hudson v. Nat'l Football League Mgmt. Council*, No. 1:18-cv-4483, 2019 WL 4784680, *1 (S.D.N.Y. Sept. 30, 2019) ("The Court agrees with Judge Lehrburger that the SPD was 'written in a manner calculated to be understood by the average plan participant,' and was 'sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.'").

Royal suggests his ERISA *section 102* claim should survive because *section 104* requires plan fiduciaries to respond to written requests for plan documents. Opp. at 14-16. This argument portrays Royal's misunderstanding of ERISA and its requirements. Section 102 of ERISA governs the contents of an SPD. Section 104 speaks to the dissemination of SPDs (and other documents), and therefore it has no logical connection to Count I.[4]

B. Count I is barred by the three-year statute of limitations that applies to ERISA section 102 claims.

Royal's Amended Complaint, opposition, and concessions in this case unequivocally prove that he knew prior to June 1, 2016 (three years before filing his Complaint) how the Board interpreted the reclassification provision and how that interpretation matched with the language in the SPD. Royal does not argue otherwise.

Instead Royal argues his claims are timely because a six-year limitations period applies. Opp. at 18-19. The Court should reject this cut-and-paste argument from *Hudson*. *See Brown v. Rawlings Fin. Servs., LLC*, 868 F.3d 126, 128 (2d Cir. 2017) (Where "[t]he question is which

[4] Section 104 of ERISA requires a plan administrator to distribute SPDs to all plan participants within certain timeframes, 29 U.S.C. § 1024(b)(1), and to provide SPDs or plan documents "upon written request." 29 U.S.C. § 1024(b)(4). It is unclear whether the Amended Complaint alleges a violation of ERISA section 104. It mentions section 104 only once, AC ¶ 53, and it never alleges Royal made a "written request" for the SPD or the Plan Document. (The array of documents Royal attached to his opposition do not contain a written request.) In addition, statutory penalties under ERISA section 502(c), 29 U.S.C. § 1132(c), are the normal remedy for a section 104 violation, but Royal does not seek statutory penalties.

[statute of limitations] is 'most analogous' to a claim under [ERISA]… we consider some characteristic features of [the ERISA claim]."); *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 744600, at *5 (S.D.N.Y. Feb. 24, 2017) ("ERISA does not prescribe a statute of limitations for disclosure claims under § 102…. [I]n this situation courts apply the most similar state statute of limitations…. The New York statute of limitations applicable to Plaintiffs' disclosure claims is the three-year period governing statutory violations."); *Osberg v. Footlocker, Inc.*, 138 F. Supp. 3d 517, 559 (S.D.N.Y. 2015) ("This Court previously determined that an SPD claim is subject to a three-year statute of limitations.").

III. Count II Also Fails Because It Does Not Plausibly Allege A Fiduciary Breach, And It Is Untimely.

Count II is a breach-of-fiduciary-duty claim under section 404(a) of ERISA, 29 U.S.C. § 1104(a). The Court should dismiss Count II for every additional reason previously explained in the Board Defendants' motion to dismiss. Only two points warrant repetition.

A. Royal's allegations demonstrate that Count II is untimely.

Royal has no response to the Board Defendants' statute-of-limitations argument. The five-page section of Royal's brief devoted to Count II, Opp. at 19-24, never mentions section 413 of ERISA, 29 U.S.C. § 1113, or explains how Count II is timely under it.

Royal first emphasizes that he "has alleged, and the Board Defendants have failed to rebut, that Royal made requests for the SPD, and all relevant documentation that applied to his original application for benefits, and was not provided those documents ***until February 2016***." Opp. at 20 (emphasis added). He concedes he "received the documents he needed prior to his original application for benefits, and at that time, ***in February of 2016***, he discovered the concealment committed by the Board Defendants of the key definitions." Opp. at 24 (emphasis added). Royal's admitted receipt of all material information as of February 1, 2016, means that

Count II is untimely under subsection 413(2) of ERISA.[5] *See* 29 U.S.C. § 1113(2) (barring a breach-of-fiduciary-duty claim brought more that "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation"); Mem. at 21-22 (explaining that subsection 413(2) bars Count II).

Royal argues the Board Defendants fraudulently concealed the SPD and the Plan Document, presumably to take advantage of section 413's "fraud or concealment" exception. This attempt to save Count II fails because, as explained, Mem. at 22, (1) there was no fraud or concealment; (2) Royal has not pleaded fraud with particularity; and (3) Royal has not alleged the Board took some independent or subsequent act to conceal its alleged failure to provide the Plan Document or SPD. *See* 9/5/19 Report & Rec., *Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-cv-4483 (ECF 16-3) at 54 (To qualify for the "fraud or concealment" exception, a plaintiff "must plead allegations of fraud or concealment with particularity and allege either that the fiduciary engaged in conduct to keep the breach concealed from the plaintiff, or that the fiduciary engaged in some subsequent act to hide that breach."); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001) (same). It is difficult to envision how the Board Defendants could have concealed an alleged failure to provide documents as promised or allegedly requested. The failure to provide the documents would have been obvious from the moment Royal failed to receive them.

[5] Royal's allegation that he did not have the "key definitions" until February 1, 2016, Opp. at 24, is absolutely false, according to three separate documents he submitted with his opposition brief: **(1)** a June 29, 2015 decision letter (ECF 28-11) (quoting the standard for Active Football benefits); **(2)** Royal's October 16, 2015 appeal letter (ECF 28-14) (quoting and discussing the Active Football standard); and **(3)** a December 2, 2015 decision letter (ECF 28-13) (same). Thus, Royal's claims are even more untimely than the Amended Complaint reveals.

B. The Amended Complaint does not plausibly allege the Board "knew" that Royal did not have the Plan Document or SPD at the time of his original application.

Count II hinges on Royal's spin on two letters he received before he applied for benefits. These letters came from Plan staff—not the Board—so the letters say nothing about the Board's knowledge of Royal or his pre-application status. Furthermore, the letters indicate an intent to provide the Plan Document to Royal, not conceal it. *See* Mem. at 17-19 (explaining why Count II does not state a plausible breach-of-fiduciary-duty claim). The Amended Complaint contains nothing but conclusory allegations that the Board Defendants "knew" Royal did not have the documents he needed to apply for benefits. These unfounded allegations about the Board's state of knowledge fail to state a viable, breach-of-fiduciary-duty claim. *Hudson*, 2019 WL 4784680, at *2-3 (dismissing breach-of-fiduciary-duty claim because the complaint lacked allegations of requisite knowledge on the part of the Board).

Royal's accusation that the Board Defendants misrepresented the contents of the letters is reprehensible. Opp. at 24 ("The Board Defendants completely misrepresented to the Court…"). The most natural reading of those letters—and the one that would explain the lack of any further request for or transmittal of the Plan Document—is that the Plan Document accompanied both of them, meaning Royal received the Plan Document twice before he applied for benefits. In any event, Royal's allegations about the letters provide no basis to infer an intent on the part of the Board to deceive Royal or conceal the Plan Document, and they do not state a plausible breach-of-fiduciary-duty claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) ("Acknowledging that parallel conduct was consistent with an unlawful [conspiratorial] agreement, the Court [in *Twombly*] nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Because the well-pleaded fact of parallel conduct, accepted as true, did

not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed.").

IV. Count V Fails For The Same Reasons Stated In Board Defendants' Opening Brief, And Royal's Opposition Does Not Argue Otherwise.

Count V attempts to void the Plan's limitations provision on the theory that the provision and the SPD describing it constitute breaches of ERISA sections 102, 404, and 410. The Board Defendants' opening brief explained this claim fails because (i) Royal lacks standing, (ii) the limitations provision incorporates ERISA section 413, (iii) the limitations provision does not attempt to relieve fiduciaries of liability, and (iv) it is untimely as a matter of law because the Plan and SPD have included the same allegedly improper provision since 2009 and 2010, respectively. Mem. at 23-24. *See Hudson*, 2019 WL 4784680, at *4 (dismissing identical claim, with prejudice, finding it untimely as a matter of law).

Royal does not respond to, and therefore concedes, these points. *In re Refco Inc. Secs. Litig.*, 826 F. Supp. 2d 478, 511 (S.D.N.Y. 2011) ("Plaintiffs do not respond to [Defendant's] argument … and therefore have conceded the point."). Indeed, his opposition omits any discussion of Count V. Count V should be dismissed with prejudice.

V. Royal Is Not Entitled To A Jury Trial.

No case in the Second Circuit has ever held that a plaintiff is entitled to a jury trial in a claim for benefits under ERISA, and that is what this case is all about. Opp. at 1 ("Royal filed his Amended Complaint against the Defendants simply seeking the disability benefits he was entitled to back when he initially applied for disability benefits…").

Royal suggests otherwise, but the cases he cites address the limited (and unresolved) question of whether a claim seeking to hold fiduciaries personally liable for monetary losses to a plan in an excessive-fee case is "legal" in nature and thus triable by a jury. Opp. at 25. *See*

Cunningham v. Cornell Univ., 2018 WL 4279466, *4 (S.D.N.Y. Sept. 8, 2018) ("The joinder of legal and equitable claims in the same pleading does not require same trier of fact for all claims. The beneficiaries' claim for money damages against the fiduciaries—a legal claim—is the only claim that will be tried to a jury. The beneficiaries' claims for removal of the trustees, an accounting, reformation of the Plans, and other equitable relief will be tried to the Court.").

Royal does not seek to recover monetary losses on behalf of the Plan. He mainly seeks an award of benefits, as noted above. The added relief he seeks, which he copied straight from the *Hudson* case (*e.g.*, reformation of the plan and removal of the Board), are unquestionably equitable in nature and not triable before a jury. The Court should strike Royal's jury demand.

CONCLUSION

For the foregoing reasons, the Court should dismiss Royal's Amended Complaint with prejudice and strike the jury demand.

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